(3)

No. 86-1062

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1986

DOROTHY E. DREYER,
Petitioner

v.

ARCO CHEMICAL COMPANY,
A DIVISION OF
ATLANTIC RICHFIELD COMPANY,
Respondent

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTION PRESENTED

Whether a plaintiff in a suit under the Age Discrimination in Employment Act may recover liquidated damages without adducing any evidence of a knowing violation or of reckless disregard of the law.

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Respondent, ARCO Chemical Company,* respectfully submits that the Petition for a Writ of Certiorari should be denied.

*Statement pursuant to Rule 28.1: ARCO Chemical Company is an unincorporated division of Atlantic Richfield Company. Other than wholly owned subsidiaries, and other unincorporated divisions, there are no affiliates of ARCO Chemical Company or Atlantic Richfield Company.

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals was entered on September 22, 1986. This Court has jurisdiction pursuant to 28 U.S.C. Sections 1254(1) and 2101(c).

APPLICABLE STATUTE

Section 7(b) of the Age Discrimination in Employment Act, Title 29, Section 626(b), United States Code, quoted at pages 2-3 of the Petition.

COUNTERSTATEMENT OF THE CASE

In 1981 and 1982, ARCO Chemical Company sought to increase efficiency by consolidating several operating units and eliminating redundant positions. One result of that reorganization was a reduction in force from 26 to 18 in the number of employees needed by the Financial Controls Department at ARCO's Monaca, Pennsylvania plant. Dorothy Dreyer was one of the employees whose positions were eliminated. At the time of the reduction in force, Ms. Dreyer was not yet old enough to qualify for ordinary retirement. However, along with anyone else in the department who was at least 55 years of age, Dreyer became eligible for special early retirement and pension benefits in connection with the reduction in force.

After initially rejecting retirement, Dreyer elected to accept retirement under the special program. Shortly thereafter, however, she sued ARCO under the ADEA. She asserted that she had been the best qualified person for one or the other of two positions which opened up in the department after her retirement. Dreyer has never asserted that there was any discrimination in the elimination of her position. Her sole grievance has been a contention that she should have been offered another position. There was no evidence that Dreyer ever took any action to apply for any such position.

A jury returned a verdict for Dreyer and awarded her over $68,000 in backpay. The jury also awarded liquidated damages, doubling Dreyer's award.

The Court of Appeals for the Third Circuit (*Sloviter*, Stapleton, Longobardi [D. Del.]) affirmed the finding of an ADEA violation, but reversed the award of liquidated damages. Applying this Court's recent decision in *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111 (1985), the Court of Appeals concluded that Dreyer had failed to adduce evidence sufficient to permit a finding that there had been a "willful" violation. The Court of Appeals noted that liquidated damages under the ADEA are intended to be "punitive," and noted the complete absence of any aggravating factors. For example, not only was there no evidence of any prior violation of the ADEA by ARCO; there was no evidence of action to deprive an employee of an imminent pension, and in fact the evidence with respect to the special retirement program offered in connection with the RIF showed the opposite; and there was no evidence of systematic purging of older persons from the workforce. The Court of Appeals concluded that the "evidence shows, at most, a violation of the ADEA," but not a "willful" violation.

REASONS FOR DENYING THE WRIT

In *Trans World Airlines, Inc. v. Thurston*, this Court held that awards of liquidated damages under the ADEA cannot stand absent evidence of heightened culpability — either specific intent or reckless disregard. The decision of the Third Circuit in the present case is nothing more, and nothing less, than a straightforward and uncontroversial application of *Thurston*. Contrary to petitioner's suggestion that the Third Circuit has ordained a sweeping and erroneous new rule of law, the Court of Appeals has simply discharged its important duty of carrying out this Court's mandates and providing concrete guidance to the district courts in fashioning

workable rules of proof and jury instructions. The Third Circuit's ruling is totally consistent with the decisions of the other courts of appeals that have considered liquidated damages awards since *Thurston*. Review on certiorari would primarily involve this Court in reevaluating the sufficiency of evidence, which this Court has repeatedly said is the function of the Courts of Appeals.

I. The Decision Of The Third Circuit Is A Proper Application of *Thurston* And Announces No New Rule of Law

Before 1985, there was considerable confusion in the lower courts with respect to Section 7(b) of the ADEA, which restricts awards of double damages to cases of "willful" violations. Thus, two Courts of Appeals held prior to 1985 that a violation was "willful" and could support an award of liquidated damages if the employer knew that the ADEA was "in the picture." *EEOC v. Central Kansas Medical Center*, 705 F.2d 1270, 1274 (CA10 1983); *Coleman v. Jiffy June Farms, Inc.*, 458 F.2d 1139, 1142 (CA5 1971). The Third Circuit went even further and held that an employee seeking double damages was only required to show that the employment decision had been based upon age and that the action "was voluntary and not accidental, mistaken, or inadvertent." *Wehr v. Burroughs Corp.*, 619 F.2d 276, 283 (CA3 1980).

Under the approach taken by these courts, and especially under the Third Circuit standard, the issue of "willfulness" could go to the trier of fact in virtually any ADEA case. As a result, entitlement to full compensatory relief identical to that available under other antidiscrimination statutes (backpay, counsel fees, and costs of suit) tended to merge with entitlement to punitive damages in ADEA cases.

In its 1985 *Thurston* decision, this Court provided much-needed guidance to the lower courts. The Court began with the language of the ADEA and noted that entitlement to double damages is "significantly

qualified" by the proviso of ADEA Section 7(b) limiting liquidated damages to "cases of willful violations." This Court reviewed not only the legislative history of the ADEA, but also the history of the Fair Labor Standards Act — the source, with significant modifications, of the scheme of remedies provided for under the ADEA — and concluded that the ADEA had been carefully crafted to provide for a two-tiered liability scheme; that "Congress intended for liquidated damages to be punitive in nature;" and that the word "willful" in Section 7(b) should be interpreted to mean what it means in the FLSA provision subjecting an employer to criminal penalties: either a deliberate violation or a situation in which the employer "wholly disregards the law . . . without making any reasonable effort to determine whether the plan he is following would constitute a violation of the law." 469 U.S. at 125-26, 128 and n.22. This Court squarely rejected the "in the picture" tests of the Fifth and Tenth Circuits, noting that they "would result in an award of double damages in almost every case." *Id.* at 128 and n.22. In so doing, this Court necessarily overruled the Third Circuit's "not accidental" standard.

Dreyer asserts that in the present case, the Third Circuit held that *Thurston* "does not apply to disparate treatment cases." Pet. for Cert. at 9. That is simply not so. In a post-*Thurston* disparate treatment decision that has been conspicuously omitted from the Petition, but which was expressly relied upon in the opinion below, the Third Circuit held that willfulness will be found if the employer "knew or showed reckless disregard for the matter of whether its conduct is prohibited by the ADEA." *Berndt v. Kaiser Aluminum & Chemical Sales, Inc.*, 789 F.2d 253, 260 (CA3 1986). It should be indisputable that that is exactly what this Court directed in *Thurston*.

In the present case, the Third Circuit faithfully followed this Court's holding in *Thurston* as reiterated in *Berndt*, and at the same time provided the lower courts in the Third Circuit with additional guidance as to what

sorts of evidence might and might not suffice to show recklessness in the context of disparate treatment cases. In a disparate treatment case, a bald instruction in conclusory terms (to the effect that an ADEA violation is "wiilful" if the employer knew that its conduct violated the statute or acted in reckless disregard of whether it did or did not) would provide little guidance to the jury. In fact, reliance upon such an instruction could do violence to *Thurston*'s requirement that liquidated damages be based upon evidence that does not merely duplicate that needed for compensatory damages.

Accordingly, the Court of Appeals held that an award of double damages in such a case requires "some additional evidence of outrageous conduct" beyond that necessary simply to show a violation of the statute. 801 F.2d at 658. The Court of Appeals then went on to specify a number of examples of such evidence, stressing that its list was by no means complete and that appropriateness of particular awards would depend upon the facts of particular cases. That list included "evidence that the employer had previously violated the ADEA," "termination of an employee at a time that would deprive him or her of an imminent pension," and evidence tending to show "the systematic purging of older people from the employee staff." *Id.*

There is no basis at all for believing that anything which this Court would view as "reckless" would fail to sustain an award of liquidated damages in a Third Circuit ADEA case. The Third Circuit's analysis is precisely consistent with *Thurston* and does nothing more or less than put additional flesh on the complex legal label of "recklessness." That is especially evident on the facts of the present case, involving a *de minimis* charge in which the Court of Appeals recognized that the evidence showed "at most" an ADEA violation. 801 F.2d at 659.

II. There Is No Conflict In Decisions Of The Courts Of Appeals

At page 10 of the Petition, Dreyer cites seven appellate cases, apparently for the purpose of suggesting to this Court that there is a conflict in the Circuits. In fact, the courts either struck down or affirmed the denial of awards of liquidated damages in all but one of those cases. *Matthews v. Allis-Chalmers*, 769 F.2d 1215, 1218-19 (CA7 1985) (affirming summary judgment for *employer*; no mention of liquidated damages); *Williams v. Caterpillar Tractor Co.*, 770 F.2d 47, 50-51 (CA6 1985) (reversing verdict awarding liquidated damages; in light of *Thurston*, evidence insufficient as a matter of law to sustain finding of "willfulness"); *Gilkerson v. Toastmaster, Inc.*, 770 F.2d 133, 137 (CA8 1985) (same); *Wilhelm v. Blue Bell, Inc.*, 773 F.2d 1429, 1435-36 (CA4 1985) (setting aside verdict awarding liquidated damages; instruction held too similar to the standards discredited in *Thurston*); *Smith v. Consolidated Mutual Water Co.*, 787 F.2d 1441, 1443 (CA10 1986) (affirming district court's denial of liquidated damages); *Archambault v. United Computing Systems, Inc.*, 786 F.2d 1507, 1514 (CA11 1986) (vacating liquidated damages; district court applied a standard that would have been correct under pre-*Thurston* law of the Eleventh Circuit, but erred in light of *Thurston*). In the remaining case, the Fifth Circuit, noting evidence that the principal supervisors, with knowledge of the ADEA, had announced that age was the reason for the employment decision, held only that the district court's findings were not clearly erroneous. *Galvan v. Bexar County*, 785 F.2d 1298, 1307 and n. 15 (1986).

At page 13 of the Petition, Dreyer cites two additional cases from the courts that respectively decided *Smith* and *Galvan*: *EEOC v. Prudential Savings & Loan Ass'n*, 763 F.2d 1166 (CA10 1985); and *Powell v. Rockwell International Corporation*, 788 F.2d 279 (CA5 1986); with

the apparent purpose of asserting the existence of a conflict. The court in *Prudential*, however, did nothing more than adopt this Court's view, 469 U.S. at 126 n.19, that an ADEA plaintiff need not show "specific intent to violate the law" in order to recover double damages. 763 F.2d at 1174. And in *Powell*, relying on *Thurston*, the court held that the instruction on "willfulness" (that an ADEA violation is "willful" if the employer " 'should have known' the actions taken would violate the ADEA") was too liberal. The *Powell* court found the error to be harmless only because the jury in that case had specifically found that the employer had fired the employee in retaliation for his filing a claim of discrimination. 788 F.2d at 286. Retaliation, which requires proof of knowledge by the employer that the employee is asserting a violation of the ADEA, is one of the most obvious of the various conceivable aggravating factors that sustain findings of "willfulness" under *Thurston*.

None of the decisions cited by Dreyer even arguably declares a rule of law inconsistent with the Third Circuit's application of *Thurston* in the present case. To the contrary, each of them recognizes the explicit holding of *Thurston* that there must be a clear and comprehensible distinction between proof sufficient to sustain a finding of an ADEA violation, on the one hand, and the kind of recklessness or deliberate misconduct that Congress intended to reach with the punitive liquidated damages provision, on the other. Even if one undertakes the heavily factual analysis which Dreyer urges this Court to do, there is no basis for believing that there is any tension or inconsistency, much less conflict of rules of law, among the lower federal courts on the subject of the Petition.

III. There Is No Other Reason To Grant Review In This Case

Well over half of the argument in the Petition expressly invites this Court to reconsider the correctness of the lower courts' application of *Thurston* to the particular facts of the present case. Pet. for Cert. at 13-19. For example, petitioner asserts in this Court that "ARCO *specifically* targeted persons in the protected age group for termination" and that ARCO "falsifie[d] both evaluations and trial testimony to justify its actions." *Id.* at 12-13. There is absolutely no support for those assertions. There are no findings or conclusions to support them, and they are contrary to the record. The record shows, for example, that more young people left the plant during the reduction in force than older people and that the population remaining in the department had a high percentage of older people. J.A. 498-99. The Court of Appeals gave careful consideration to the supposed evidence of aggravating factors on which Dreyer actually elected to rely, and reasonably found that none of it was substantial. 801 F.2d at 658-59.

Beyond that, petitioner's factual arguments simply highlight the fundamental flaw in the Petition from the standpoint of this Court's standards: petitioner is attacking a decision of a Court of Appeals that, as to the law, falls well within the scope of this Court's prior holdings and that otherwise turns primarily upon its own particular facts. There is no reason to select this case for review.

CONCLUSION

The Petition for Certiorari should be denied.

February, 1987

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